tiff had no intention of entering into any binding contract for the purchase of the lands without some sort of assurance that its plans for the proposed development would be approved. It was in order to enable it to ascertain from the appropriate authority whether its plans for commercial development would be approved that the option was initially for four months. It is common knowledge that approvals of such plans take time. It was for that reason that clause 5 provided for the option to be extended so as to give the plaintiff ample time in which to obtain such approval. The defendants, quite understandably, were not prepared to agree to an extension for an indefinite period. Provision was therefore made at their request for this extension to be limited to eight months.

As I have said, the extension was agreed to by the parties so as to allow ample time for a decision to be obtained from the appropriate authority on the application for development of the lands for commercial purposes. Clause 5 of the agreement therefore was to come into operation only if no decision was made on the application within four months. To my mind, it was not to come into operation if a decision was made, one way or the other, by the appropriate authority within that period. I agree that the words "not being approved" can be synonymous with "refused". But bearing in mind the object and intent of the option agreement and looking at it as a whole and considering it in its general context, the words "not being approved" were not synonymous with "refused", so that if the original application was refused within the first period of four months the option was limited to four months.

As I have stated earlier, it was open to the plaintiff to exercise the option even after the refusal of his application before the expiry of the period of four months. But this was not done and there was no application before the appropriate authority after the refusal of the initial application on 14th April, 1966 and before the option agreement come to an end by effluxion of time. The discussions which Dato' Eric Taylor had with Mr. Watkinson cannot be said to have resurrected the application which had been refused. If the application had not been refused but had been returned for some amendments and it was re-submitted with the necessary amendments, then if no final decision was made on it before the end of the initial period of the option agreement, clause 5 would have come into operation so as to extend the option for a further period of eight months.

It seems clear from the agreement that for clause 5 to come into operation the condition precedent was that there should be in the hands of the appropriate authority on the last day of the initial period of the option a formal application together with the proposed plans for approval on which no decision had been made. Obviously the provision for extension of the option was made so as to allow more time for a decision to be obtained on the original application. Needless to say, there was no provision in the agreement for a further application to be made in the event of the first application not being approved within the initial period of the option. The first application having been refused, clause 5 of the agreement therefore never came into force.

In my opinion, there was no option in existence when the plaintiff purported to exercise it. It was contended by the respondent that the appellants did not give notice of termination of the option agreement until long after the date of the expiry of the period of four months. The short answer to that is that the appellants presumably knew nothing about the application having been refused. In any event, there was no evidence that they were informed about it as soon as the refusal notice was received by the plaintiff. Moreover, in my judgment the notice of termination of the option agreement has no bearing whatsoever on the case. Indeed, no notice to terminate the option was necessary when the option had terminated itself by lapse of time.

I would therefore allow the appeal, set aside the judgment of the court below and substitute for it an order that the suit do stand dismissed. The respondent must pay the costs of this appeal and costs in the court below. The deposit made by the appellants towards costs is to be refunded to them.

Azmi L.P. and **Lee Hun Hoe J.** concurred.

Appeal allowed.

Solicitors: *Athi Nahappan & Co.; Lovelace & Hastings.*

PAN AH BA & ANOR. v. NANYANG CONSTRUCTION SDN. BHD.

[F.C. (Azmi L.P., Gill F.J. and Lee Hun Hoe J.) May 26, 1969]

[Kuala Lumpur—Federal Court Civil Appeal No. X.73 of 1968]

Contract — Land — Agreement of sale — Payment of deposit — Agreement requiring intending purchaser to enter into a formal agreement, on failure of which deposit to be forfeited — Whether performance of promise dispensed with — Contracts (Malay States) Ordinance, 1950, s. 63.

This was an appeal by the plaintiffs, administrators of the estate of Ng Lye Hoong deceased, against the judgment of the High Court dismissing their claim ([1969] 1 M.L.J. 39). The deceased Ng Lye Hoong entered into an agreement with the respondent company for

the purchase of land and premises in Kuala Lumpur. She paid the respondent company $10,000 and it was agreed that she would subsequently enter into a formal agreement and that on failure to do so after notice, the deposit would be forfeited. On failure of the said Ng Lye Hoong to enter into formal agreement, the respondent company wrote to her and said that if she should fail to sign the formal agreement, the respondent company would sell the land to other purchasers. Ng Lye Hoong then wrote to the respondent company requesting them to sell the property to other purchasers and to return her deposit of $10,000. Subsequently the respondent company informed the said Ng Lye Hoong that unless she signed the formal agreement the deposit would be forfeited. The appellants, as the administrators of the estate of Ng Lye Hoong sued for the return of the deposit. The High Court dismissed their action and they appealed to the Federal Court.

Held, allowing the appeal: on the facts the respondent company had in their letter dispensed the deceased from performing her part of the contract and therefore the estate of the deceased was entitled to the return of the deposit.

Cases referred to:—

(1) *Chhunnu Mal Ram Nath* v. *Mool Chand-Ram Bhagat* A.I.R. 1928 P.C. 99.

(2) *Abaji Sitaram Modak* v. *Trimbak Municipality* (1904), I.L.R. 28 Bombay 66.

FEDERAL COURT.

Richard Talalla for the appellants.

Wong Soon Foh for the respondents.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal by the plaintiffs, administrators of the estate of Ng Lye Hoong (f) deceased, against the judgment of the High Court dismissing their claim for the return of $10,000, deposited by the deceased with the defendant, a company incorporated in Malaysia and the owner of a housing estate situated in Kuala Lumpur.

On 23rd April, 1964, Ng Lye Hoong to whom I shall refer as the deceased, during her life-time executed a printed document marked as exhhibit P.3, under which she confirmed her intention to purchase from the defendant company a 3 storey shophouse in Jalan Tiong in Kuala Lumpur at a price of $88,750. She paid the defendant company $10,000 on the execution of the exhibit P.3.

Clauses 3 and 4 of exhibit P.3 read as follows:—

"Clause 3: I/We will enter into formal agreement in the form and on such terms and conditions as your solicitors shall prescribe within fourteen (14) days from your giving notice requiring me/us to do so (time being of the essence). Failure to comply with such notice shall entitle you to forfeit the said deposit as liquidated damages and this agreement shall become null and void and of no further effect and I/we shall not be entitled to make any claim against you nor to any right title or interest in the property.

4: You may at your absolute discretion rescind this agreement by giving notice in writing and returning the said deposit to me/us (but without costs, interest or any other additions whatsoever) and the same shall be accepted by me in full satisfaction of all claims hereunder. This sale is also subject to building plans being approved by authority."

Written at the foot of the document are the following words and figures:—

"(1)	Payment	$10,000
(2)	Payment	$18,750
(3)	Payment	$15,000
	Balance	$45,000
		$88,750 "

Oral evidence was given to explain that those figures represent periodical payments to be made by deceased though the dates for those payments were not given.

It would be seen from the above that the deceased would have to sign the formal agreement (to be prepared by the company's solicitor) within 14 days from the notice given to her and that time was the essence of the agreement, and that if she should fail to sign the agreement and pay the next instalment within the time prescribed the company would be entitled to forfeit the deposit. On the other hand the defendant company may rescind the contract by giving notice in writing and returning the deposit but without costs, interest and any other addition whatsoever and she was to accept the deposit in full satisfaction of all claims.

On 1st June. 1964, the defendant company sent a notice to the deceased requesting her to go and see the defendant company's solicitors to sign the formal agreement and to pay the sum of $18,910 to meet the second payment including solicitors' charges and stamp fees.

Apparently deceased did not comply; so another letter dated 8th July, 1964 was sent to her with a similar request. Again another letter dated 5th August, 1964. She acknowledged receipt of the letter but merely asked for a copy of the agreement for her perusal.

On 20th August, 1964 the defendant company wrote again to the deceased requesting her to go and sign the agreement and at the same time informed her that if she should fail to do so within seven days of the date of this letter the defendant company will sell the property to other purchasers on its list. Deceased in acknowledging receipt of that still insisted on having a copy of the agreement.

On 15th September deceased wrote to the defendant company and requested it to sell the property to other purchasers and to return her deposit of $10,000.

On 5th October the defendant company again wrote requesting deceased to go and sign the agreement. No reference to deceased's letter of 19th September was made, though the

defendant's director admitted in his evidence that this letter had been received by the company.

On 14th December, 1964 the defendant company wrote to deceased repeating its previous request and at the same time pointed out that this was the last chance to be given to her and unless she signed the agreement and paid the $18,910 before 20th December, 1964 the transaction was to be cancelled and the deposit forfeited and the property to be sold to other purchasers. This was the first time threat of forfeiture was brought to her.

After further correspondence between the deceased's solicitor and the defendant company, the plaintiffs sued the defendant company for the return of the deposit on the ground that the defendant company had rescinded the agreement by informing the deceased that it would sell the property to other purchasers if she should fail to comply with its request. It was also claimed that the deposit being in the nature of a penalty, section 75 of the Contract Ordinance should be applied.

The defendant in its defence stated that the letter of 20th August saying that it would sell the property to other persons was merely a warning that it could render the agreement null and void. The defendant company also maintained that the deposit being only 12.7% of the purchase price was a reasonable sum in case of contracts of sale of land, and it would therefore be entitled to retain it.

The learned judge dismissed the suit and the plaintiffs appealed to this court.

There are several grounds of appeal. I think I need only deal with one ground namely as to whether the defendant company by its letter dated 20th August, 1964 had dispensed with the performance of the promise made to it by the deceased.

In reference to this letter the director of the defendant company D.W.1 said as follows:—

"The letter at page 12 of P.1 (i.e. letter of 20th August, 1964) was the third reminder sent by the defendant company to the deceased. By the last sentence of this letter the defendant company meant that if the deceased failed to sign the agreement the defendant company would resell the property and forfeit the deposit. The word "forfeiture" was not mentioned in this letter because the company was giving the deceased a chance to sign the agreement but if she failed to do so the deposit would be forfeited."

In answer to further questions the director said:—

"If there had been a purchaser for this property on receipt of the letter of the deceased at page 9 of P.1 (i.e. deceased's letter dated 5th September, 1964 requesting the defendant company to resell the property to other purchasers and return the deposit to her) the company could have agreed to the refund of the deposit."

In his judgment, the learned judge accepted the defendant company's contention that the letter of 20th August, 1964 was intended to be a warning. The learned judge did not give any reasons or thought it necessary to say what he meant by a warning but in my view if the learned judge had considered at this juncture of his judgment that under the agreement P.3 it gave the right to the company to rescind the contract at any time without apparently any reason, then he would have no doubt realised the seriousness of what was stated in the letter. To my mind, the words in the letter were clear, namely, that if the deceased should fail to sign the contract within 7 days and pay the next instalment the company would rescind the agreement and return the deposit. See paragraph 4 of the agreement.

Now as to the law on this question. Section 64(1) of the Contracts (Malay States) Ordinance, 1950 (corresponding to section 63 of the Indian Contract Act 1872) provides that every promisee may dispense with or remit wholly or in part the performance of the promise made to him. The rest of the section is irrelevant to the present question.

The Privy Council in *Chhunna Mal Ram Nath* v. *Mool Chand — Ram Bhagat* [1] strongly dissented from the observations of Sir Lawrence Jenkins C.J. in *Abaji Sitaram Modak* v *Trimbak Municipality* [2] where the learned Chief Justice took the view that a dispensation or remission under section 63 involved an agreement as defined by section 2(e) of the Contract Act of India. In other words, in order to constitute a dispensation of a promise under section 63 of the Indian Contract Act, neither consideration nor an agreement is necessary provided of course that it is clear from the evidence that the promisee had so dispensed with the performance of the promise by a voluntary conscious act and it must be an affirmative act on his part. Therefore, in my view, by the words in the letter of 20th August, 1964, namely "Will you kindly call at our solicitor's office . . . . to sign the agreement within 7 days without any further delay, should you fail to comply with this notice we shall resell the above property to other purchasers on our waiting list", the defendant company had dispensed with the performance of the agreement by the deceased. The words of the letter are clear. In my view therefore, when the deceased had failed to sign the agreement as requested by the letter of 20th August, 1964, the company had dispensed her from performing her part of the contract with the result that the contract was rescinded and that the estate of the deceased is entitled to the return of the deposit as provided in paragraph 4 of the agreement P.3.

The appeal is therefore allowed and there will be an order directing the defendant company to return the deposit of $10,000 to the plaintiffs immediately with interest at 6% from the date of the judgment of the court below to the date of recovery. The defendant company will pay the plaintiffs' costs here and in the court below. The plaintiffs' deposit of $500 will be returned to them.

Gill F.J.: I have had the benefit of reading the judgment of the Lord President and am in full agreement with it.

It was clear from the evidence that the respondents, when they wrote their letter of 20th August, 1964 to the deceased to say that they would sell the property to other purchasers on their list if she failed to sign the agreement within seven days, had no intention to forfeit the deposit. By her letter of 15th September, 1964 the deceased requested the respondents to sell the property to other purchasers and to return her deposit. For three months after that letter the respondents said nothing about their right to forfeit the deposit, and then for the first time threatened forfeiture as an afterthought. In the circumstances, there was the clearest possible evidence of their having dispensed with or wholly remitted the performance of the promise made to them by the deceased, so that they were not entitled to forfeit the deposit.

I therefore agree with the Lord President that this appeal be allowed with costs to appellants here and in the court below, that there be an order directing the respondents to return the deposit of $10,000 to the appellants forthwith together with interest thereon at 6% per annum from 25th October, 1968 to date of payment, and that the appellants' deposit of $500 be returned to them.

Lee Hun Hoe J.: I have the advantage of reading the judgment of the Lord President and Gill F.J. I agree with their judgments.

It is a pity we are procluded from dealing with the interesting question whether there is in existence a binding contract or not as the matter was not raised in the court below. Although there are five grounds of appeal the most important one concerns the construction of the letter dated 20th August, 1964, upon which would depend the outcome of the appeal.

By that letter the respondent company clearly wanted to impress upon the deceased that if within seven days she did not take certain steps then they would sell to other purchasers on their waiting list. They could have strictly enforced clause 3 of the agreement but they had waived time as being the essence of the contract. The deceased was perfectly right to ask them to sell to other purchasers on their waiting list and refund her the deposit. It was not until about three months later that they threatened deceased for the first time with forfeiture. The director of the respondent company stated that if there had been a purchaser for the property when deceased requested them to sell they would have refunded the deposit. The letter of 20th August was clear and definite as to other purchasers on their waiting list. The deceased had rightly taken advantage of the offer in order to get out of the agreement. In my view the respondent company dispensed with the performance of the agreement by the deceased.

I agree that the appeal be allowed with costs here and below to the appellants and that there be an order directing the respondent company to return the deposit of $10,000 to the appellants forthwith and that the deposit of $500 be returned to the appellants.

Appeal allowed.

Solicitors: *Richard Talalla & Co.; Chooi & Co.*

CALTEX OIL MALAYSIA LTD. v. TEE THAN SONG

[O.C.J. (Raja Azlan Shah J.) May 26, 1969]
[Kuala Lumpur — Civil Suit No. 373 of 1969]

Practice and Procedure — Injunction — Application for interlocutory injunction — Licence to carry on service station — Cancellation of licence.

The plaintiffs applied for interlocutory injunction to restrain the defendant, his servants, agents and any person holding through or under him from remaining on or upon the service station of the plaintiffs and from removing any or all of the equipment on the said premises. The plaintiffs were the owners of the premises and had given a licence to the defendants to carry on the retail sale of the plaintiffs' products at the service station on the condition that the licence may be terminated by either party on giving to the other party thirty days previous notice in writing. The plaintiff by notice in writing cancelled the licence. The defendant received the said notice but refused to comply with the terms. The plaintiffs claimed that they have suffered irreparable damage in that they have been deprived of the use of the said premises and service station and they will continue to suffer damage both financially and in reputation. The defendant alleged the plaintiffs will not suffer irreparable damage and gave reasons for his allegations.

Held: as irreparable damage both in terms of money and reputation would be occasioned to the plaintiffs if the defendant were allowed to remain on the premises, the interlocutory injunction would be granted.

Case referred to:—

(1) *Kesho Prasad Singh* v. *Srinibash Prasad Singh* (1911), I.L.R. 38 Cal. 791, 794.

CIVIL SUIT.

Harry Elias for the plaintiffs.

D.P. Vijandran for the defendant.